

IN THE MATTER OF A REVIEW BY THE COMPLAINT REVIEW COMMITTEE
OF A DECISION OF THE COMPLAINTS DIRECTOR OF THE COLLEGE OF
PHYSICIANS AND SURGEONS OF ALBERTA (THE "COLLEGE")
UNDER SECTION 68 OF THE *HEALTH PROFESSIONS ACT*, R.S.A., c. H-7
REGARDING DR. LLOYD CLARKE, REGULATED MEMBER

Decision of Complaint Review Committee

December 13, 2018

Preamble

A meeting of the Complaint Review Committee (the "CRC"), properly constituted under section 16 of the *Health Professions Act* (the "HPA"), was held on October 29, 2018 to consider Ms. Ingrid Hess's (the "Complainant") request for a review of the dismissal of her complaint about Dr. Lloyd Clarke (the "Investigated Member").

The CRC members in attendance were as follows:

- Dr. Paul Greenwood (Chair)
- Dr. Stacy J. Davies (Physician Member)
- Ms. Marg Hayne (Public Member)

Ms. Greg Sim attended as independent legal counsel for the CRC.

The review pursuant to section 68 of the HPA was conducted through written submissions.

Documents Reviewed by the CRC

Materials reviewed in advance of the meeting by the CRC were:

- Complaint Reporting Form and submission dated June 5, 2018;
- Authorization for Release of Information dated May 31, 2018;
- Complaint Director's letter of dismissal of the complaint to the Complainant dated June 22, 2018;
- Complaint Director's letter of dismissal of the complaint to the Investigated Member dated June 22, 2018;
- Complainant's request for review dated July 3, 2018;
- Complainant's written submission dated September 10, 2018; and
- Written submission from legal counsel for the Investigated Member dated October 17, 2018.

Background

The Complaints Director dismissed this complaint without an investigation per section 55 of the Act.

Two related complaints, 180371.1.1. and 180372.1.1 were brought by Ms. Hess who is the lawyer on behalf of three clients who are all indigenous people and were living in a tent camp on the edge of Cardston, Alberta. Ms. Hess described her clients as homeless and disadvantaged.

The Investigated Member is a family physician who practices in the town of Cardston. On May 25, 2018 the Investigated Member had just exited a convenience store in Cardston when he started to shout at some people who were bystanders in the vicinity of the store. He approached this group which included the three people legally represented by Ms. Hess, and yelled loudly at them. While there are discrepancies between a written statement by Ms. Hess' clients and the Investigated Member's own written account about what he said, the Investigated Member does not dispute that he yelled that they should get jobs and that they should not be loitering there. The Investigated Member also acknowledged that he started to walk away and then turned back and made a remark about the bystanders wanting Tylenol 3's.

The complaints were dismissed by the Complaints Director on the grounds that the behavior, although unfortunate and inappropriate, was not committed during the provision of medical care. The Complaints Director expressed the view that the College is unable to dictate the behavior of what a physician does outside the clinical setting, excluding extreme circumstances.

In the letter to the Investigated Member the Complaints Director wrote:

"Notwithstanding [that the complaints have been] dismissed, the complaint highlights how our interactions with community members is viewed. As physicians, we have a prominent position in society and while I cannot dictate what you can say or do outside a clinical setting, I would urge you to reflect on your interaction and resist conduct even in a community setting, that which could undermine your professional integrity."

Submissions at Review

In her request for a review of the Complaints Director's decision, the Complainant has argued that the decision to dismiss the complaints was flawed, unreasonable and incorrect because it failed to take into consideration how the Investigated Member's comments, while made outside of the clinical setting, might reflect deeply instilled biases and beliefs about indigenous people, especially those like the target of his comments who were affected by serious social disadvantage and addictions. The Complainant felt that this could impact the Investigated Member's capacity to objectively assess and treat indigenous patients. She sought to have the College undertake a review of whether the Investigated Member could act objectively and impartially when caring for indigenous patients, and to require him to undertake cultural sensitivity and bias awareness training. To support the contention that behaviour outside of medical practice could be considered unprofessional, the Complainant cited the recent case of a registered member of the College of Physicians and Surgeons of Alberta who was charged with child pornography offences and where the College did take action.

Counsel for the Investigated Member argued that the decision of the Complaints Director met the test of reasonableness, as it was clearly explained with reasons why he felt that the conduct did not meet the test for unprofessional conduct. The Complaints Director demonstrated his understanding of the feelings of those affected by the remarks of the Investigated Member, but still felt that the behavior did not rise to the level of unprofessional conduct, as it did not involve remarks made in the practice of medicine. Dismissal of the complaint was one of the options available to the Complaints Director and Counsel for the Investigated Member argued that the test of reasonableness had been met.

In response to the request for review, Counsel for the Investigated Member argued that the issues raised by Ms. Hess about racial issues were serious ones, but they were not relevant to the decision of the Complaints Director and the remarks made by the Investigated Member, although unfortunate and inappropriate, were not racist. The Investigated Member was greatly affected by the incident on May 25, 2018 and deeply regrets the things he said which were out of character for him. He has since engaged with a therapist which has helped him to address stressors that contributed to his conduct on May 25. He has also participated in an indigenous Sundance with members of the Blood Tribe (Kainai Nation) which greatly impacted him. He has also agreed to offer a formal apology for his actions. The Investigated Member does not agree that the incident on May 25, 2018 was any indication of his inability to provide proper medical care. Those concerns were speculative and unfounded.

Decision

The CRC has reviewed all the material and submissions and confirms that the complaint is dismissed on the basis that there is insufficient evidence of unprofessional conduct on the part of the Investigated Member.

In reaching its conclusion, the CRC applied a standard of review of reasonableness. A decision will be reasonable if it falls within a range of possible, acceptable outcomes which are defensible in terms of the facts and the law.

In considering what action to take, the CRC has specifically considered whether there is sufficient evidence that the Investigated Member has engaged in "unprofessional conduct" to warrant a hearing by a Hearing Tribunal. The term "unprofessional conduct" is defined in section 1(1)(pp) of the *Health Professions Act*.

In particular the CRC considered whether there is sufficient evidence of the conduct described in the following sections of the definition of unprofessional conduct:

- lack of knowledge, skill or judgment [section 1(1)(pp)(i)];
- contravention of the HPA, the code of ethics, or standards of practice [section 1(1)(pp)(ii)];
- contravention of other legislation that applies to the profession [section 1(1)(pp)(iii)]; or
- conduct that harms the integrity of the medical profession [section 1(1)(pp)(xi)].

In reaching its decision, the Committee carefully considered the remarks acknowledged by the Investigated Member and whether they were sufficient evidence of unprofessional conduct to warrant referral to a hearing before a Hearing Tribunal. The CRC felt empathy for the recipients of these remarks and behavior and recognized how they might be perceived as being racist remarks. The CRC also recognized the effect these remarks had on the recipients, and that they interpreted these comments as being particularly insensitive as they were indigenous people, homeless and disadvantaged.

However, the CRC also considered that there was no evidence the Investigated Member made any racial slurs and the remarks were made outside of the setting of medical practice. The Committee recognized that conduct occurring outside of an investigated member's medical practice can amount to unprofessional conduct, but whether or not such conduct is sufficient to warrant a hearing can only be determined on a case by case basis taking all of the circumstances into account. There is no question the Investigated Member's remarks were intemperate and inappropriate in the circumstances but the CRC did not find there was sufficient evidence of unprofessional conduct to warrant a discipline hearing in this case.

In the original complaint, the Complainant expressed a desire, from one of her clients, that an outcome of the complaint would be that the Investigated Member receive training in the treatment of, and communication with, indigenous people. This same client was also concerned that the Investigated Member's racism towards indigenous community members, impaired his ability to treat them as patients.

Counsel for the Investigated Member detailed how the Investigated Member has taken significant measures to meet these expectations:

- The registered member is himself an indigenous person, being a Maori from New Zealand.

- He has strong positive relationships with members of the indigenous community.
- In a role as a medical leader with the South Zone of AHS he has been working with the Blood Tribe and the Piikani Nation and has been called upon when indigenous issues arose.
- Since the incident the Investigated Member has participated in an indigenous Sundance with members of the Blood Tribe.
- As part of his agreement with AHS over the same incident, he is consulting with the indigenous community over the best and most constructive ways to address an apology to the individuals who were hurt and angered by his remarks.

The CRC did not feel that the remarks made were indicative of a racist attitude of the Investigated Member. Given his Maori ancestry and his service to a community where a large number of his patients are indigenous, it seems unlikely that the Investigated Member's statements were motivated by anything other than uncharacteristic intemperance. Indeed, the steps that the Investigated Member has taken since the incident that led to the complaint, reveal a deep sense of regret and sincere attempts at self-education and healing.

For all the above reasons, the CRC finds the decision of the Complaints Director to be reasonable and upholds the decision of the Complaints Director to dismiss the complaint.

Signed on behalf of the Complaint Review Committee by its Chair:



Dr. Paul Greenwood